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MOHD BADLI ABD RAZAK & ORS v. ALI ISMAIL

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA

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[CIVIL APPEAL NO: T-02(NCVC)(W)-2151-12-2014]
23 JUNE 2016

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COMPANY LAW: *Directors – Fiduciary duties – Agreement to extract timber – Terms in agreement between directors for share of proceeds – Whether terms in contravention of applicable laws – Whether formulated to circumvent law pertaining to management of financial matters and assets of company*

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CONTRACT: *Agreement – Agreement to extract timber – Breach – Whether terms of agreement valid and enforceable – Terms in contravention of applicable laws – Whether formulated to circumvent law pertaining to management of financial matters and assets of company – Whether agreement capable of performance*

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The respondent's ('the plaintiff') case was wholly founded upon the claim that the plaintiff had a valid and enforceable contract with the first and second appellants ('the first and second defendants') as evidenced in the document known as 'pembahagian' agreement executed by the three parties. It was the plaintiff's contention that he was appointed as a further director of the third appellant ('the third defendant') on 8 March 2012 and as a result of himself and the first defendant, the third defendant secured from the relevant authorities, lands for timber felling and extraction. The plaintiff claimed that the first and second defendants had agreed to share the proceeds from the sale of timber extracted on 50/50 basis with the plaintiff but had subsequently acted in breach of the terms of the 'pembahagian' agreement. Therefore, the plaintiff claimed that he was entitled to be paid 50% of the proceeds of the sale of timber. The defendants, on the other hand, contended that the terms contained in the 'pembahagian' agreement were unlawful for being in breach of the provisions of the company law applicable in respect of the affairs and assets of the third defendant, and accordingly was not binding on any of the defendants. The trial judge held that there was a contract between the parties and the terms of the 'pembahagian' agreement were valid and binding on the defendants. Hence, the appeal by the defendants. The issue herein was whether the 'pembahagian' agreement and the terms expressed therein were valid and enforceable as against the first, second and/or the third defendant from the perspective of law governing the affairs and conduct of directors of a company.

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Held (allowing appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

(1) The plaintiff and the first and second defendants, as the directors of the third defendant or shareholders, owed not only a fiduciary duty to each other as *qua* shareholders, but more significantly to the third defendant both in common law and statutorily. In their capacity as the directors and officers of the company, they were to exercise their powers in the best interest of the third defendant at all times. The fiduciary obligations reposed in them as directors prohibited these individuals from entering into transactions which would bring into conflict the interest of the company with personal interests. (para 30)

(2) The third defendant was not a party to the 'pembahagian' agreement. When the agreement was concluded on 19 April 2012, the plaintiff and the first and second defendants were already directors of the third defendant. The 'pembahagian' agreement did not provide that the matters agreed to by the three individuals therein would be conditional upon or subject to the formal approval by resolution of the Board of Directors or the shareholders of the third defendant at general meetings. (para 24)

(3) Shareholders are only entitled to participate in the profits of a company, that too, through distribution of dividends declared and approved at general meetings of the company. The arrangement entered into as per the terms of the 'pembahagian' agreement was to divert the proceeds at its source and share them only between the plaintiff and the first defendant. The effect of this was to by-pass the strict requirements in law which mandated the prior preparation of a profit and loss account, the annual audit of the company accounts before the recommendation for payment of dividends from profits was to be tabled and approved at a general meeting of shareholders. Hence, the 'pembahagian' agreement was to circumvent the law pertaining to management of the financial matters and assets of an incorporated entity. (para 26)

(4) The 'pembahagian' agreement was not formulated as a shareholders' agreement and the very foundation of a valid contract was seriously in doubt. The plaintiff's objective in getting the first and second defendants to enter into the 'pembahagian' agreement was merely to ensure himself a guaranteed 'commission' out of the sale of the timber land or of timber extracted from the identified land. The terms or arrangements contemplated by the 'pembahagian' agreement were in contravention of applicable laws and were accordingly incapable of performance and consequentially void. Therefore, the order granted by the court was unsustainable in law and ought not to have been allowed by the trial judge. (paras 33, 35 & 36)

A ***Bahasa Malaysia*** *Headnotes*

Kes responden ('plaintif') secara keseluruhannya adalah berasaskan tuntutan bahawa plaintif mempunyai kontrak sah dan berkuat kuasa dengan perayu pertama dan kedua ('defendan pertama dan kedua') seperti yang ditunjukkan dalam dokumen yang dikenali sebagai perjanjian pembahagian yang
B dimeterai oleh ketiga-tiga pihak tersebut. Hujahan plaintif adalah bahawa dia dilantik sebagai pengarah lanjut oleh perayu ketiga ('defendan ketiga') pada 8 Mac 2012 dan melalui plaintif dan defendan pertama, defendan ketiga berjaya memperoleh tanah untuk membalak daripada pihak-pihak berkuasa yang relevan. Plaintif menyatakan bahawa defendan-defendan pertama dan
C kedua bersetuju berkongsi hasil jualan balak pada dasar 50/50 dengan plaintif tetapi kemudiannya bertindak melanggar terma-terma perjanjian pembahagian. Oleh itu, plaintif menyatakan bahawa dia berhak dibayar 50% daripada hasil jualan balak. Sebaliknya, defendan-defendan menghujahkan bahawa terma-terma yang terkandung dalam perjanjian pembahagian tidak
D sah kerana melanggar peruntukan-peruntukan undang-undang syarikat yang diguna pakai berkaitan pengurusan dan aset-aset defendan ketiga, dan dengan itu, tidak mengikat mana-mana defendan. Hakim bicara memutuskan bahawa wujud kontrak antara pihak-pihak dan terma-terma perjanjian pembahagian adalah sah dan mengikat defendan-defendan. Oleh itu, rayuan ini oleh
E defendan-defendan. Isu di sini adalah sama ada perjanjian pembahagian dan terma-terma yang terkandung di dalamnya sah dan berkuat kuasa terhadap defendan-defendan pertama, kedua dan/atau ketiga daripada perspektif undang-undang yang berkaitan dengan pengurusan dan pengendalian oleh pengarah-pengarah sesebuah syarikat.

F **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Plaintif, defendan pertama dan kedua, sebagai pengarah defendan ketiga atau pemegang saham, mempunyai kewajipan fidusiari bukan sahaja terhadap sesama sendiri sebagai pemegang-pemegang saham, tetapi lebih
G khusus kepada defendan ketiga dari segi common law dan juga statut. Dalam kapasiti mereka sebagai pengarah-pengarah dan pegawai-pegawai syarikat, mereka sepatutnya melaksanakannya demi kepentingan syarikat pada setiap masa. Kewajipan fidusiari mereka sebagai pengarah-pengarah menghalang mereka daripada memasuki transaksi-transaksi
H yang akan mewujudkan konflik antara kepentingan syarikat dengan kepentingan peribadi.

(2) Defendan ketiga bukan pihak dalam perjanjian pembahagian. Apabila perjanjian tersebut dimuktamadkan pada 19 April 2012, plaintif dan defendan pertama dan kedua sudah pun menjadi pengarah defendan
I ketiga. Perjanjian pembahagian tidak memperuntukkan bahawa perkara-perkara yang dipersetujui oleh ketiga-tiga individu tersebut adalah

bersyarat atau tertakluk kepada kelulusan secara formal oleh resolusi Lembaga Pengarah atau pemegang-pemegang saham defendan ketiga dalam mesyuarat agung.

(3) Pemegang-pemegang saham hanya berhak mengambil bahagian dalam keuntungan syarikat, iaitu, melalui pengagihan dividen yang diisytiharkan dan diluluskan dalam mesyuarat agung syarikat. Perjanjian yang dimasuki seperti dalam perjanjian pembahagian adalah untuk memindahkan hasil di peringkat sumbernya dan untuk dikongsi hanya antara plaintif dan defendan pertama. Kesannya adalah untuk memintas keperluan ketat dari segi undang-undang yang memandatkan penyediaan terdahulu akaun keuntungan dan kerugian, audit tahunan akaun syarikat sebelum cadangan bagi pembayaran dividen-dividen daripada keuntungan dikemukakan dan diluluskan dalam mesyuarat agung pemegang-pemegang saham. Oleh itu, perjanjian pembahagian adalah untuk memintas undang-undang berkaitan dengan pengurusan dan perkara-perkara kewangan dan aset-aset sebuah entiti yang diperbadankan.

(4) Perjanjian pembahagian tidak dirumuskan sebagai perjanjian pemegang saham dan asas sebenar bagi kontrak sah adalah amat diragui. Matlamat plaintif dalam membuatkan defendan pertama dan kedua memasuki perjanjian pembahagian adalah hanya untuk memastikan jaminan supaya dia mendapat komisyen daripada jualan tanah pembalakan atau balak yang dikeluarkan dari tanah yang dikenal pasti. Terma-terma atau perjanjian-perjanjian yang dibayangi oleh perjanjian pembahagian bercanggah dengan undang-undang yang diguna pakai dan dengan itu tidak boleh dilaksanakan dan terbatal. Oleh itu, perintah yang diberikan mahkamah tidak boleh dikekalkan dari segi undang-undang dan tidak wajar dibenarkan oleh hakim bicara.

Case(s) referred to:
Marra Developments Limited v. BW Rofe Pty Ltd (1977) 3 ACLR 185
Winkworth v. Edward Baron Development Co Ltd (1987) 1 All ER 114

Legislation referred to:
Companies Act 1965, ss. 132(1), (1A), (1B), 365(1)

Companies Act 1961 [Aus], s. 376(1)

For the appellants - Mohammad Rafaei Adnan & Mohd Hazwan Hamidun; M/s Rafaei & Co
For the respondent - Abdul Aziz Hasan; M/s Nordin Kassim & Aziz

[Editor's note: Appeal from High Court, Kuala Terengganu; Civil Suit No: 22-NCVC-09-03-2014 (overruled).]

Reported by S Barathi

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JUDGMENT

Varghese George JCA:

Introduction

B **[1]** The High Court in Kuala Terengganu had on 4 November 2014 allowed the plaintiff's writ action against the defendants and issued the following orders (as translated from Bahasa Malaysia):

(a) The defendants were to pay the plaintiff 50% of the proceeds from the sale of timber extracted from the area in Tanah Kerajaan Mukim Chukai measuring 37.00 hectares held under Lesen Pembalakan No: L3003/ 2014(TK)(BB) No. Fail JPHT: 400/7/1/1521;

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(b) By a permanent injunction the defendants and/or their workers and/or their agents were restrained from undertaking any timber felling and/or extraction and/or sale of timber from the area in Tanah Kerajaan Mukim Kerteh measuring 22.00 hectares held under Lesen Pembalakan No. L3002/2014 (TK)(BB) No. Fail: JPHT 400/7/1/1523, until the orders herein were complied with by the defendants;

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(c) By a permanent injunction the defendants and/or their workers and/or their agents were restrained from obtaining Lesen Pembalakan for two areas within Tanah Kerajaan Mukim Jerangau Dungun of area 11.00 hectares and 31.00 hectares respectively approved by Jabatan Perhutanan Negeri Terengganu (JPNT) to the third defendant under JPNT's letter on 1 April 2012, until the orders herein were complied with by the defendants;

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(d) There be specific performance by the first and second defendants of the terms of the perjanjian persetujuan pembahagian dated 19 April 2012; and

(e) The first, second and third defendants jointly and severally pay the plaintiff 50% of the proceeds of the sale of the area and/or sale of timber extracted from the (i) Tanah Kerajaan Mukim Kerteh in area 22.00 hectares held under Lesen Pembalakan No: L3002/2014 (TK)(BB) No. Fail: JPHT 400/7/1/1523; and (ii) two areas under Tanah Kerajaan Mukim Jerangau Dungun respectively in area 110.00 hectares and 31.00 hectares as approved by Jabatan Perhutanan Negeri Terengganu (JPNT) to the third defendant under JPNT's letter of 1 April 2012.

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[2] The plaintiff's case was wholly founded upon the claim that the plaintiff had a valid and enforceable contract with the first and second defendants as evidenced in the document titled the perjanjian persetujuan pembahagian dated 19 April 2012 (the pembahagian agreement) executed by the three parties. The principal contention of the defendants on the other hand was that the terms contained in the pembahagian agreement were

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unlawful for being in breach of the provisions of company law applicable in respect of the affairs and assets of the third defendant, and accordingly not binding on any of the defendants.

[3] The learned trial judge after a full trial held that there existed a contract between the parties as contended by the plaintiff and the terms of the pembahagian agreement were valid and binding on all the defendants. The court then granted the plaintiff the orders as enumerated above.

[4] On appeal to us, after having heard and considered submissions of respective counsel, we did not agree with the decision of the learned trial judge. We accordingly set aside all those orders. We now set out our grounds for doing so. The parties will be referred to in this ground of judgment as they were at the High Court.

Background

[5] The third defendant was a company incorporated under the Companies Act 1965. Prior to March 2012 the only shareholders and directors of the third defendant were the first and second defendants. The first defendant held 95% shares, while the second defendant, his wife, held the remaining shares in the corporate entity.

Plaintiff's Version of Events

[6] The plaintiff stated that he was appointed a further director of the third defendant on 8 March 2012 and as a result of the efforts of himself and the first defendant, the third defendant was able to secure from the relevant authorities a total of 200 hectares of land in four locations in the State of Terengganu for timber felling and extraction. A letter dated 1 April 2012 was issued to the third defendant by the Jabatan Perhutanan Negeri Terengganu (JPNT) confirming that right to fell and extract timber from those areas of State land identified therein.

[7] The plaintiff claimed that the first and second defendants had agreed with the plaintiff to share the proceeds from the sale of the timber extracted from the four areas on a 50/50 basis. Towards that end:

(a) The first defendant agreed to transfer from the first defendant's shares in the third defendant such shares as was necessary to vest 50% of the total shares in the third defendant in the name of the plaintiff and Form 32A (form of transfer of securities) was executed by the first plaintiff to that effect on 16 April 2012; and

(b) On 19 April 2012 the plaintiff and the first and second defendants executed the pembahagian agreement which expressly provided for the other relevant agreed terms of the arrangement agreed between the parties.

[8] Sometime in December 2012 however the plaintiff discovered that the third defendant had previously entered into some transaction with a third party, who was now threatening to take legal action against the third defendant, the first and second defendants and also against the plaintiff (as a current director of the third defendant then), allegedly for monies that were owing to that third party, of which transaction he had not been informed or had any knowledge of.

[9] Upon enquiry with the third defendant's statutory secretary, the plaintiff also discovered about then that the intended transfer of shares from the first defendant to the plaintiff (*via* the executed form 32A) had not been registered or effected.

[10] Subsequently the plaintiff gathered that he had also been removed as a director of the third defendant and this was confirmed by a company search he conducted on 30 July 2013.

[11] It was also the plaintiff's allegation that further investigations by him also revealed that the first and/or second defendants had caused the third defendant to enter into an arrangement to sell the right to the felling and/or extraction of timber in the Mukim Kerteh area to another third party who had already commenced such activity; the plaintiff was not consulted or informed of such a transaction.

[12] The plaintiff's complaint was basically that the defendants had acted in breach of the terms of the pembahagian agreement and that he was entitled to be paid 50% of the proceeds of the sale of the timber from all the four areas. Accordingly the plaintiff sought an order for specific performance of the pembahagian agreement and appropriate injunctory orders against the defendants until that order for specific performance was complied with.

Defendants' position

[13] The first defendant admitted to be 'aware' of the pembahagian agreement but maintained that whatever arrangement therein stated involved the first defendant and the plaintiff only.

[14] The second defendant denied executing the pembahagian agreement or of knowing the plaintiff prior to 2013. (At the trial the first defendant admitted that he had forged the second defendant's purported signature on the pembahagian agreement).

[15] The defendants main line of defence was centred on 'illegality' of the arrangements contained in the pembahagian agreement and they were that:

(a) the plaintiff's appointment as a further director of the third defendant and the purported transfer of shares from the first defendant to the plaintiff were not in accordance with the memorandum and articles of

association of the third defendant. In any event, there was no resolution of the existing directors or of the shareholders of the third defendant (the company) approving of the appointment of the plaintiff as a director or for the transfer of shares to the plaintiff; and

(b) the terms in the pembahagian agreement to share the proceeds of the sale of extracted timber or related rights in respect of the four areas contravened provisions of the Companies Act 1965 insofar as the duties and responsibilities of the directors to the third defendant as a company was concerned. It was stressed that what was involved here was the company's property/assets and to allow the proceeds of the sale of timber to be carved out and paid directly to certain of the directors of the third defendant also violated the requirement that any such distribution could only be effected from profits of the company after proper annual accounts were drawn up and audited, and that too by way of dividend payments approved at general meetings.

[16] For the record, the defendants also pleaded that the letter on 1 April 2012 from JPNT was secured by the efforts of the first and second defendants and that the plaintiff played no part in obtaining the same.

Findings Of The Trial Judge

[17] The learned trial judge held that the plaintiff had discharged the burden of proof upon him on a balance of probabilities to prove his case. The court's principal findings were that the second defendant did in fact execute the pembahagian agreement (despite her denial), that the 'defendants' (*sic*) were not credible witnesses and could not be believed and the issues of (director's) fiduciary duties and the lack of (company) resolution (to sanction the terms) raised by the defendants were not relevant (tidak terpakai) in this case.

[18] The relevant parts of the rather brief 'dapatan mahkamah' are reproduced below:

> 17. Perjanjian tersebut ditandatangani oleh pihak-pihak di hadapan seorang peguam iaitu SP2 yang dilantik oleh Defendan pertama. Setelah meneliti keterangan SP2, saya mendapati Defendan kedua telah menandatangani perjanjian tersebut di hadapan SP2 pada tarikh yang lebih awal iaitu sebelum 19.4.2012. Keterangan SD1 dan SD2 yang menafikan Defendan kedua menandatangani perjanjian tersebut ditolak oleh Mahkamah. Saya mendapati apabila perjanjian tersebut ditandatangani di hadapan peguam yang menyediakan perjanjian atas arahan Defendan pertama sudah semestinya pihak-pihak khususnya Defendan pertama dan kedua mengetahui terma-terma tersebut. Justeru itu, keterangan Defendan pertama dan kedua yang menyatakan Defendan kedua tidak tahu kewujudan dan kandungan perjanjian bertarikh 19.4.2012 ditolak oleh mahkamah.

A 18. Saya mendapati Plaintif dalam kes ini adalah seorang yang lurus dan tuntutan ini diakaskan berdasarkan terma-terma perjanjian yang dipersetujui oleh pihak-pihak. Saya mendapati Defendan-Defendan adalah saksi-saksi yang tidak "credible" dan tidak boleh dipercayai.

19. Saya mendapati kes-kes yang dirujuk oleh peguam cara Defendan
B adalah tidak terpakai kerana isu "fiduciary duties" dan tiadanya resolusi syarikat adalah tidak terpakai dalam kes ini. Saya menerima keterangan Plaintif dan berpuas hati bahawa Defendan pertama telah menurunkan tandatangan pada borang 32A tetapi tidak didaftarkan jelas menunjukkan ketidakjujuran Defendan pertama untuk menyempurnakan perjanjian pembahagian tersebut. Fakta kes-kes yang dirujuk oleh Defendan patut
C dibezakan.

20. Saya merumuskan terma-terma dalam penjanjian persetujuan pembahagian tersebut mengikat pihak-pihak. Tindakan Defendan pertama dan kedua yang telah menjual kawasan balak tersebut kepada pihak ketiga termasuk SP3 adalah tidak sah dan terbatal.

D **Our Deliberation And Decision**

[19] We must at the outset state that we had no quarrel with the finding of fact made by the learned trial judge that the 'pembahagian agreement' had been executed by the second defendant, *albeit* on a date before '19 April 2012' as was recorded on the document itself. This finding was based on the
E learned trial judge's assessment of the respective testimonies of the lawyer who attested the signatures (SP2) and of the first defendant (SD2) and the second defendant (SD1) in court. We found no reason to interfere with that finding.

F **[20]** The real issue before the court, in our view was, however, whether the pembahagian agreement and the terms expressed therein were valid and enforceable as against the first, the second and/or the third defendant from the perspective of the law governing the affairs and conduct of directors of a company.

G It called into question particularly the limits as dictated by law on the powers of a director when it involved dealing with assets of the company. It also raised serious issues pertaining to how the financial affairs, particularly the income and profits of a company, like the third defendant, had to be managed for the benefit of a corporate entity and its shareholders under applicable
H corporate law requirements.

[21] The learned trial judge was in our assessment rather dismissive of these aspects of the defence raised for the defendants. There was a total lack of analysis or any appreciation of the legal implication underlying the effect of the so called terms found in the pembahagian agreement insofar as the
I administration or assets of the third defendant was involved. There was no disputing that the directors of the third defendant owed a fiduciary duty not just to each other, but also to the company (third defendant) and its

shareholders based on the special relationship based on trust and confidence involved when dealing with the affairs and assets of a company. This seemed to have been overlooked or avoided totally by the learned trial judge.

[22] Given the defences that had been raised, the learned trial judge ought to have examined in some detail the effect of the arrangement envisaged under the pembahagian agreement and further assessed its implication in so far as the law governing corporations was concerned. There was no denying the fact what was at stake here were the assets belonging to or contingent income derivable from those assets belonging to the third defendant, an incorporated company.

[23] The obvious error of the learned trial judge was that the terms of the pembahagian agreement was only examined cursorily and superficially before the orders of far reaching implication were granted. The learned trial judge ought to have gone further and asked the correct question, namely, whether the terms apparently agreed was within the bounds of the law and whether the purely personal arrangement, as it was, was sustainable and/or enforceable in any event when it involves assets of a incorporated company.

[24] The third defendant, it must be firstly noted, was not a party to the pembahagian agreement. On 19 April 2012 when this agreement was concluded the plaintiff was already a director of the third defendant (appointed with effect from 8 March 2012), so were the other two parties, the first and second defendants. There was nothing provided in this rather casually drawn up pembahagian agreement that the matters agreed to by the three individuals therein would be conditional upon or subject to the formal approval by resolution of the Board of Directors or of the shareholders of the third defendant at general meeting.

[25] Even assuming that the plaintiff was rightfully a director and a shareholder of the third defendant (see Seksyen 1.02 pembahagian agreement and notwithstanding the first and second defendants' denial) what was of significance under the arrangements recorded between the three individuals was the intention to direct the proceeds of timber area sold or from the extracted timber sold to be shared as amongst the plaintiff and the first defendant only. This was obvious from section 2.01 of the pembahagian agreement which was as follows:

> Seksyen 2.01 Perjanjian Pembahagian
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> Tanpa mengambil kira pegangan saham dan jumlah modal yang telah dikeluarkan, Pihak-Pihak Tersebut bersetuju untuk membahagikan jumlah harga jualan Kawasan Membalak Tersebut (selepas ini dirujuk sebagai "Bayaran Tersebut") sebagaimana di bawah bebas dari sebarang tuntutan pihak-pihak lain, tertakluk kepada syarat-syarat dan terma-terma dan juga tertakluk kepada representasi, warranti, akujanji dan perjanjian yang dinyatakan di bawah ini.

No.	Pihak	Bahagian Hasil Harga Jualan (%)
1	Pihak Pertama	50
2	Pihak Kedua	50

Seksyen 2.02 Terma-Terma Bayaran

Kesemua pihak di dalam Perjanjian ini bersetuju bahawa kesemua Bayaran Tersebut hendaklah dibuat dan dibayar oleh Syarikat Tersebut kepada Pihak Pertama dan Pihak Kedua mengikut masa dan cara seperti berikut:

SEBAIK SAHAJA Bayaran Tersebut telah dijelaskan oleh mana-mana pembeli melalui akaun bank yang telah dipersetujui oleh Pihak-Pihak Tersebut sebagaimana Seksyen 3.01 (ii), maka Pihak-Pihak Tersebut hendaklah dengan apa jua cara tanpa gagal membuat pembayaran keseluruhan harga Bayaran Tersebut mengikut jumlah bahagian sebagaimana Seksyen 2.01.

Seksyen 3.01 Akujanji Pihak Pertama dan Pihak Kedua

Serentak dengan penyempurnaan tandatangan Perjanjian ini, Pihak-Pihak Tersebut bersetuju bahawa

(i) Mana-mana perjanjian jual beli berkenaan Kawasan Membalak Tersebut akan ditandatangani oleh Pihak Pertama dan Pihak Kedua secara bersama

(ii) Satu akaun bank Syarikat Tersebut akan dibuka yang mana akaun tersebut hanya akan digunakan secara khusus bagi tujuan penerimaan bayaran Kawasan Membalak Tersebut sahaja (selepas ini dirujuk sebagai "Akaun Tersebut) dan mana-mana akaun bank yang lain tidak akan digunakan

(iii) Segala pembayaran melalui Akaun Tersebut akan ditandatangani secara bersama oleh Pihak Pertama dan Pihak Kedua."

[26] It was trite that shareholders were only entitled to participate in the profits of a company, that too, through distribution of dividends declared and approved at general meetings of the company. The arrangement entered into as *per* the terms of the pembahagian agreement was to divert the proceeds at its source and share them as between only the plaintiff and the first defendant (to be paid out from a special bank account to be opened for that purpose). The effect of this was to by-pass the strict requirements in law which mandated the prior preparation of a profit and loss account, the annual audit of the company's accounts before the recommendation for payment of dividends from profits (if at all available) was to be tabled and approved at a general meeting of shareholders. What was clearly being attempted to be done by the terms of the pembahagian agreement here was to circumvent the law pertaining to management of the financial matters and assets of an incorporated entity.

[27] Section 365 of the Companies Act 1965 is in the following terms: A

> 365. Dividends payable from profits only
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> (1) No dividend shall be payable to the shareholders of any company except out of profits or pursuant to section 60.
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> [Section 60(2) relates to Share Premium Account of the Company]. B
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> (2) Every director or manager of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 60:
>
> (a) Shall without prejudice to any other liability be guilty of an offence against this Act; and C
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> (b) Shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and that amount may be recovered by the creditors of the liquidator suing on behalf of the creditors. D
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> Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.
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> (3) If the whole amount is recovered from one director or from the manager he may recover contribution against any other person liable who had directed or consented to the payment. E
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> (4) No liability by this section imposed on any person shall on the death of the person extend or pass to his executors or administrators nor shall the estate of any such person after his decease be made liable under this section.
>
> (5) In this section "dividend" includes bonus and payment by way of bonus. F

[28] The New South Wales Court of Appeal in *Marra Developments Limited v. BW Rofe Pty Ltd* (1977) 3 ACLR 185 per Hutley JA explained the meaning of the term 'payable ... out of profits' in s. 376(1) of the Companies Act 1961 (NSW) (in *pari materia* with s. 365(1) of our Act) in the following manner: G

> It was contended that the word "payable ... out of profits" could not be understood literally, in that the profits of a company were not a segregated fund from which something was physically extracted for the purposed of distribution. I find no difficulty in giving a literal meaning to the words. Profits of a Company for the purpose of a final dividend can H only be understood against the accounts which have to be laid before the Company.
>
> ... These accounts have to disclose profits and losses, and the directors of the company have the duty to ensure that the profit and loss account give "a true and fair view of the profit or loss of the company". When I section 376(1) provides that no dividend shall be payable except out of profits, what it means in relations to a final dividend is that the laying

A before the company of a profit and loss account and balance sheet which truly and fairly discloses a profit out of which dividend may be paid is a pre-condition of the shareholders acquiring any right to a dividend ..."

[29] Further, Lord Templeman in *Winkworth v. Edward Baron Development Co Ltd* (1987) 1 All ER 114 (House of Lords) has on this subject, observed
B as follows:

> A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.

C **[30]** There was no doubt in our mind that the plaintiff, the first defendant and second defendant, as officers of the third defendant holding the position of directors in the third defendant or personally as shareholders owed not only a fiduciary duty to each other as *qua* shareholders, but more significantly to the third defendant (as an entity) both in common law and
D statutorily. In their capacity as directors and officers of the company they were to exercise their powers in the best interest of the third defendant at all times. The fiduciary obligations reposed in them as directors prohibited these individuals from entering into transactions which would bring into conflict the interest of the company with their personal interests.

E **[31]** Section 132(1) and 132(1A) of the Companies Act 1965 which statutorily set out the strict parameters of the directors' exercise of powers in office was spelt out in the following terms:

> Section 132
>
> F (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.
>
> (1A) A director of a company shall exercise reasonable care, skill and diligence with:
>
> (a) the knowledge, skill and experience which may reasonably be
> G expected of a director having the same responsibilities; and
>
> (b) any additional knowledge, skill and experience which the director in fact has.

[32] Further with respect to 'business judgment' it is provided in s. 132(1B)
H as follows:

> (1B) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:
>
> (a) makes the business judgment in good faith for a proper purpose;
>
> I (b) does not have a material personal interest in the subject matter of the business judgment;

(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) reasonably believes that the business judgment is in the best interest of the company.

[33] It bears restating that what was at stake under the terms of the pembahagian agreement was the property and assets of the company and there was in any event no approval or sanction as to those matters by appropriate resolutions of the third defendant as an entity. It was clear to us therefore that the terms or arrangements contemplated by the pembahagian agreement were in contravention of applicable laws to which all companies were subject to. Those terms and arrangements were accordingly incapable of performance and consequentially void.

[34] The learned trial judge had clearly erred in not asking the right questions and examining the serious implications in law surrounding the arrangements apparently agreed between the signatories to the pembahagian agreement in their individual capacities. The court was, in our considered view, in no position to countenance the terms and arrangements set out in the pembahagian agreement and allow the orders as was granted to the plaintiff.

[35] We were unanimous therefore that the orders granted by the court in 4 November 2014 were unsustainable in law and ought not to have been allowed by the learned trial judge. This was a proper case where appellate intervention was warranted and necessary.

[36] In passing we are also constrained to make a note of the following:

(a) The pembahagian agreement (distribution agreement) was not formulated as a 'shareholders agreement' as normally found when a company is incorporated or a new shareholder is brought in; such 'shareholders agreement' regulates the rights between the shareholders and any special arrangements to be implemented, was always within the permitted scope of the company's articles and memorandum of association and generally within the provision of the law applicable to a corporation;

(b) The pembahagian agreement failed to even state the consideration for the entering into of the arrangements thereunder between the individuals concerned and/or the consideration for the transfer of shares from the first defendant to the plaintiff such as to give the plaintiff a 50% interest in the third defendant; the very foundation of a valid contract in existence was seriously in doubt in the circumstances;

(c) The plaintiff's objective in getting the first and second defendants to enter into the pembahagian agreement as drawn up, was in our view, merely to ensure to himself a guaranteed 'commission' out of the sale

A of the timber land or of timber extracted from the identified land; that explained why the plaintiff had failed between April and December 2012 to follow up to formalise his position as one of the shareholders and/or to actively participate in the affairs of the third defendant.

B **[37]** Any relief or remedy that the plaintiff might have had in the circumstances, perhaps against the first defendant, lay elsewhere and by a different process. Definitely, the plaintiff was not entitled to the relief as pleaded and sought in this writ action.

[38] For the reasons elaborated above, we were unanimous that the appeal C be allowed with costs here and below to the defendants.

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